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CARBERT//WAITE LLP

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Honourable Members of the Irish Joint Committee on International Surrogacy

Dear Sirs/Madams:

Thank you for the kind offer to speak to this Committee on the issue of the possibility of exploitation in surrogacy arrangements.

Background

I have practiced law in Canada for 21 years. Over the years, I have developed a speciality in the area of assisted reproduction. Together with my law partner Rachel West, I run Western Canada's largest surrogacy and fertility law practice. I split my law practice between fertility and surrogacy law and a general litigation/dispute resolution practice.

In a typical year, we open 400 assisted reproduction contract files (surrogacy contracts and egg/embryo/sperm donation contracts). We also have between 70 and 100 surrogacy babies born each year in the province of Alberta. My firm handles the parentage/court process for those files. That process differs from province to province. In many of these cases, the babies are born to foreign nationals coming to Canada because surrogacy is difficult or impossible in their home jurisdiction.

In the last three or four months, I have had initial consults with some 20 sets of Irish intended parents - both same sex and heterosexual - exploring the opportunity to come to Canada to have their much wanted baby via surrogacy. Much of this demand has been driven by the situation in Ukraine.

While I am very proud of the fact that Canada is a jurisdiction which welcomes internationals with open arms, and is non-exploitative, I tell every one of these consults that I wish they could undergo this process in Ireland without having to come halfway across the world.

I hope that the good work that this Committee does will move Ireland closer to that goal.

Exploitation

Exploitation is a loaded word. It is a negative and shameful word. Respectfully, starting from an assumption of exploitation is the wrong approach.

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Modern empirical research shows that properly managed surrogacy is not exploitative. Surrogacy is **empowering** for the incredible women who choose to give this gift to:

- the one in seven heterosexual couples who experience infertility;
- the singles who have no partner but wish to be parents; and
- the extensive same sex community which deserves to be treated with respect and dignity in their difficult and costly journey to become parents.

I do not mean to suggest that exploitation cannot happen. Of course it can, and I share below some thoughts for managing that risk based on my many years of experience in dealing with surrogates, intended parents, clinics, agencies, physicians and my fellow lawyers who care deeply about ensuring that surrogacy in Canada is practiced in an ethical way.

Surrogacy is about empowerment. It is a gift. It is a celebration of a woman's choice to carry a child for an infertile couple or to give the gift of parenthood to a same sex couple or to a single man.

How to Prevent Exploitation

Preventing exploitation requires understanding the possible sources of exploitation and a practical guideline for managing these risks.

The three best sources of protection for surrogates are:

1. Comprehensive psychosocial evaluations & competent and ethical clinicians;
2. Agencies to manage receipts / expenses; and
3. Independent legal advice for all parties

Possible Source of Exploitation	How to Manage this Risk
Surrogates seeking financial gain	<ul style="list-style-type: none"> - altruistic receipt based model clearly reduces risk of exploitation - ensuring surrogates are not in financial need – psychosocial evaluations - independent legal advice for all parties - give surrogates a voice – WHY do they want to be a surrogate?
Surrogates coming from a risk profile background	<ul style="list-style-type: none"> - psychosocial assessments carried out by licenced counselors competent to assess risk - again, give surrogates a voice
Surrogate's domestic partner	<ul style="list-style-type: none"> - psychosocial assessment should include domestic partner or partners - ensuring domestic partner(s) are involved in the legal process & feel included as part

Possible Source of Exploitation	How to Manage this Risk
	of the surrogacy journey
Ensuring Surrogate is healthy and the pregnancy will not endanger/harm her	<ul style="list-style-type: none"> - clinic review of birth history records - comprehensive clinic review - competent, empathetic fertility physicians
Rushing from IPS or Clinics	<ul style="list-style-type: none"> - build in time for clinic evaluations - take the time to ensure the surrogate gets to know her Intended Parents - waiting to complete legal agreements until after screening is complete – usually the parties have had time to get to know one another
Pressure from Intended Parents to reduce or minimize expenses to benefit the Intended Parents	<ul style="list-style-type: none"> - take receipt management out of the hands of IPS/surrogates - agencies are <u>very valuable</u> - similar to US escrow model - independent legal advice for all parties
Loneliness or vulnerability	<ul style="list-style-type: none"> - communities of surrogates encouraged by agencies - relationship building - lawyers fees should include being available at no additional cost to surrogates throughout the process
Pressure to do something the Surrogate does not wish to do (eg: twins; termination)	<ul style="list-style-type: none"> - laws which make it clear that no woman can ever be forced to do anything with her body she does not wish to do

Summary

My friend and colleague Sara Cohen has presented this Committee with the research of Professor Karen Busby and Samantha Yee.

These research papers confirm what those of us practicing in the area know through experience. Surrogates are empowered, fascinating women.

Canadian fertility clinics have used psychosocial assessments for years to ensure that surrogates are not entering the relationship from a place of vulnerability. As a result, surrogates are usually educated, they are financially stable and they often work in the “caring professions” (nursing, childcare, home care). They are incredibly strong and I like to repeat Professor Busby’s observation that many can be described

as “non-conforming extroverts”. Over my years of practice, I have worked with many hundreds of surrogates and this description rings true.

Surrogates are usually the first to stand up for themselves. However, in the Canadian model, lawyers, counsellors and surrogacy agencies are there to assist in advocating for them where necessary.

The few practical measures which I have suggested above can be used to protect these women. But a modern approach (non-paternalistic) is not to start from a presumption of weakness or exploitation. Surrogacy is empowering and life changing. The women who elect to become surrogates should be celebrated. In Canada, we try hard to celebrate them and I hope to see the same in Ireland through the process that you are engaging in.

I would be pleased to address any questions and thank you again for the invitation to share these thoughts.

CARBERT WAITE LLP



Ellen K. Embury | Partner

Fellow, American Academy of Adoption & Assisted Reproductive Technology Attorneys

Ellen K. Embury is one of Canada's leading experts in the area of surrogacy and fertility law. She is a partner with Carbert Waite LLP in Calgary, Alberta. Ms. Embury graduated from the University of Victoria, British Columbia in 1999 with a LL.B. and a Masters Degree in Public Administration.

Ms. Embury developed her interest in fertility and surrogacy law over the first five years of her law practice. She has helped thousands of couples and individuals of all backgrounds and sexual orientations to become parents. She works with intended parents, surrogates, egg and sperm donors and also with physicians and clinics across Canada and the United States. Surrogacy agencies from across Canada and internationally refer their clients to Ms. Embury for assistance with surrogacy legal services throughout Canada.

Ms. Embury is privileged to have been asked to co-chair Canada's biannual national conference on Reproductive Technology Law each year that the conference has been held since its creation in 2014. She is also regularly asked to lecture on surrogacy and fertility law across Canada and around the world. She takes particular enjoyment in teaching law students and high school students about the laws and ethics of assisted reproduction in Canada.

Ms. Embury is a Fellow of the American Academy of Assisted Reproductive Technology Attorneys and she is also a member of the Canadian Fertility and Andrology Society. Other memberships include the Law Society of Alberta and the Alberta Association of Women Lawyers.

Ms. Embury sits as a member of two non-profit Boards of Directors in the Calgary area, and splits her practice between civil litigation and fertility law.

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